Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ADRIAN HENNON,

Petitioner,

v.

KEITH COOPER,
Warden, Joliet Correctional Center,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether, after finding numerous instances of improper closing argument by a state court prosecutor which were designed to lessen the state's burden of proof in an accountability case, a Court of Appeals should affirm the dismissal of a habeas corpus petition under a *de novo* standard of review or under the standard set forth in the recent amendments to the Anti-Terrorism and Effective Death Penalty Act of 1996, when by so ruling and failing to enforce the commands of *Darden v. Wainwright*, 477 U.S. 168 (1986), the Court of Appeals encourages such improper arguments to be made in future cases.

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The opinion of the United States Court of Appeals, Seventh Circuit, affirming the District Court's dismissal of Adrian Hennon's Petition for Habeas Corpus is reproduced at App. 1. The District Court's opinion dismissing Adrian Hennon's Petition for Habeas Corpus is reproduced at App. 11. The Illinois Appellate Court's opinion affirming Adrian Hennon's conviction is reproduced at App. 35.

STATEMENT OF JURISDICTION

Adrian Hennon was convicted of murder on October 16, 1989. His conviction was affirmed by the Illinois Appellate Court on March 16, 1992. (App. 35). The federal district court dismissed Adrian Hennon's Petition for Habeas Corpus without a hearing on December 27, 1995. (App. 11). The United States Court of Appeals, Seventh Circuit, affirmed the District Court's dismissal of the Petition for Habeas Corpus on March 14, 1997. (App. 1).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."

The Fourteenth Amendment to the United States Constitution provides in pertinent part, that "nor shall any State deprive any person of life, liberty, or property without due process of law. . . ."

STATEMENT OF FACTS

I. Introduction

On October 16, 1989, seventeen year-old Adrian Hennon was convicted, based on an accountability theory, of first-degree murder, attempted murder, and armed violence. On September 9, 1988, Mr. Hennon was one of three occupants of a car from which shots were fired. (Tr. I, 92). Those shots killed Abdullah Asad and wounded Jason Murray. (Tr. I, 156-58; Tr. II, 116). The State's theory was that Mr. Hennon was the driver of the car. (Tr. IV, 32). Adrian Hennon testified that he did not know or intend that shots would be fired, that he was not the driver and that Richard Terrell was. (Tr. III, 182). In a statement admitted into evidence at Mr. Hennon's trial, Richard Terrell admitted that he, Terrell, was the driver. (Tr. III, 220). Although Mr. Hennon asked the court to be tried after his codefendant, Terrell, so that he could call Terrell as a witness, the trial court judge denied the request relying solely upon the order in which the defendants' names appeared in the indictment as the basis for ordering the trials. (Supp. Tr. Vol. 2, 20). Adrian Hennon was therefore tried at the same time as Terrance Mack, the alleged shooter, but before a separate jury. Richard Terrell, the other codefendant, pled guilty to murder after Mr. Hennon's trial was completed and received 22 years, the minimum Illinois sentence for murder plus two years. (Supp. Tr. Vol. 1, 1579).

Although Mr. Hennon had never ever been arrested before, he was sentenced to concurrent prison terms of 40 years for murder and 20 years each for attempted murder and armed violence. (Tr. VI, 72-3).

II. The Trial

The State tried Mr. Hennon on an accountability theory. (Tr. IV, 33). The State did not allege that Mr. Hennon had a gun in his possession or that he fired any shots. During opening statement and throughout the entire trial, the State's theory was that Mr. Hennon was the driver of the car. The State contended that Mr. Hennon was accountable for the shots that passenger Terrance Mack fired because he intended that the crime take place and slowed the car to make the shooting possible. (Tr. IV, 32-33). Mr. Hennon testified at trial that he was not the driver of the car, but rather a passenger in the front seat. (Tr. III, 182). Mr. Hennon also testified that he did not have any knowledge that anybody in the car had a gun or intended to shoot until the shots were fired from the back seat. (Tr. III, 181).

A. The State's Case

The State called four witnesses who identified Mr. Hennon as the driver. Duvon Miller testified that he was standing in the park when he saw the car approach, heard three shots, and dove to the ground. (Tr. II, 14-15). Miller claimed that Adrian Hennon was driving and Terrance Mack fired the shots from the front window of the car. (Tr. II, 14-15). However, Miller admitted that he had initially told the police that he had seen Adrian Hennon in the front seat but could not remember who was driving, and that consistent with Adrian Hennon's testimony, the gunshots were fired from the back seat. (Tr. II, 40-42). Miller also admitted that he told defense investigators prior to trial that the shots came from the Nova's back seat. (Tr. II, 36). Darren Harris, Esau Asad, and Elward Verrett also identified Adrian Hennon as the

driver of the car (Tr. II, 75; Tr. I, 154-55, 92), but there was no evidence that they had told the police that Mr. Hennon was the driver at the time they identified Mr. Hennon at a lineup. (Tr. II, 101; Tr. I, 198, 116). The three specifically identified Terrance Mack as the shooter at this lineup. (Tr. II, 76-7; Tr. I, 158-59, 96).

The credibility of the testimony of all four of these State witnesses—Duvon Miller, Darren Harris, Esau Asad, and Elward Verrett—was impeached at trial. All four were involved in the gang-related shouting match which precipitated the shooting. (Tr. II, 112-13). Harris was facing two charges for delivery of a controlled substance and one charge for armed violence at the time he testified for the State. (Tr. II, 76). Miller had been convicted of attempted armed robbery prior to testifying. (Tr. II, 18). Esau Asad was the brother of the victim of the shooting and had been convicted of aggravated battery. (Tr. I, 158). Verrett was a good friend of Jason Murray, the other person who was injured during the incident. (Tr. II, 126).

B. Defense Case

Mr. Hennon testified at trial that he was not the driver of the car when the shots were fired. (Tr. III, 182). Mr. Hennon testified that at the time of the shooting, Richard Terrell, his co-defendant, was driving the car while Mr. Hennon was sitting in the front passenger seat. (Id.). According to Mr. Hennon, Terrance Jobe, sitting in the back seat of the car, was the person who fired the shots. (Tr. III, 178-79, 181). Mr. Hennon testified that he did not know that Jobe had a gun and did not know that he intended to shoot anyone until the shots were actually fired. (Tr. III, 181).

Mr. Hennon described the events leading to the shooting as follows. On September 9, 1988, Richard Terrell stopped by Adrian Hennon's house and asked him for a ride. (Tr. III, 171). At Terrell's request, Mr. Hennon agreed to let Terrell drive his Chevy Nova car. (Id.). Later on, after picking up Terrance Mack, with Richard Terrell still driving, they stopped at a gas station. (Tr. III, 173). At this gas station, the three encountered Mark Watts, Terrence Jobe, and Haroon Binwalee in a jeep. (Tr. III, 174). Watts, Jobe, and Binwalee asked Terrell and Mack to follow them. (Tr. III, 175). Mr. Hennon did not know Watts, Jobe, and Binwalee very well and took no part in the conversation. (Tr. III, 175-76, 177-78).

After driving to a park, Watts, Jobe, Binwalee, and Terrance Mack left their cars and went across the street. (Tr. III, 176). Adrian Hennon stayed inside his car with Richard Terrell. (Tr. III, 177). Mr. Hennon did not hear the argument that took place. (Id.). When the four returned to their vehicles, Jobe got into the back seat of the Chevy Nova, and Mack went into the jeep. (Tr. III, 178-79). After stopping at a gas station, Terrance Jobe told Richard Terrell to drive to a fast food restaurant, the route to which would take the Nova past the park where the earlier argument had taken place. (Tr. III, 180). When across from the park, Jobe started shooting out the rear passenger seat window. (Tr. III, 181). Mr. Hennon asked Terrance Jobe why he was shooting. (Tr. II, 182). Terrance Jobe told him not to worry because he hadn't hit anybody. (Id.). Mr. Hennon and Richard Terrell told Jobe that he had to get out of the car and dropped him off. (Id.).

The defense presented other evidence that Mr. Hennon was not the driver of the car during the time of the

shooting. The defense subpoenaed Mark Watts, a friend of Richard Terrell and one of the jeep's occupants, who testified that Terrell was driving the car shortly before the shooting occurred, which was consistent with Mr. Hennon's account. (Tr. III, 86). Mr. Hennon also introduced the signed statement his co-defendant, Richard Terrell, made to the police the day after the shooting. (Tr. III, 217). In this statement, Terrell admitted driving the car at the time the shots were fired. (Tr. III, 220).

C. The Prosecutor's Closing Argument

During his closing argument and rebuttal, the prosecutor made statements to the jury to which defense counsel objected. Defense counsel made a total of 39 objections. Of these objections, 27 were made during the prosecutor's rebuttal argument to which, of course, defense counsel could not respond.

The prosecutor made several statements which inaccurately characterized the Illinois law regarding accountability. In accordance with the Illinois law on accountability, the trial court judge instructed the jury that:

> [a] person is legally responsible for the conduct of another person when, either before or during the commission of an offense, and with the intent to promote or facilitate the commission of that offense, he knowingly solicits, aids, abets, agrees to aid, or attempts to aid the other person in the planning of commission of the offense.

(Supp. Tr. Vol. 2, 36). The prosecutor, on the other hand, incorrectly argued in his rebuttal that Adrian Hennon's mere presence in the car was enough evidence upon which to base a guilty verdict. Specifically, the prosecutor argued to the jury that "[p]assengers in these drive-

by murders get convicted all the time." (Tr. IV, 103). The District Court and the Court of Appeals found this argument improper. (App. 20-21, App. 4). The prosecution went on to argue over defense counsel's objections:

> Passengers can be just as accountable as drivers . . . So it really doesn't matter. I mean if you really want to buy that he isn't the driver by the conduct which he showed before that, the knowledge of these conversations, he can be just as guilty if he's the passenger or if he's the driver.

(Tr. IV, 103-04). Defense counsel again objected to the prosecution's statement. In response, the court failed clearly to inform the jury of the impropriety of the prosecution's remarks.

> The Court will indicate the jury will find the facts and decide the case and will apply the law to the facts and decide the case. Counsel may make argument based on the evidence.

Another mischaracterization of the law of accountability, one strategically designed to eliminate the State's obligation to prove Mr. Hennon's specific intent beyond a reasonable doubt, occurred when the prosecutor analogized Mr. Hennon's alleged conduct to the momentum of a "big steel ball" in his rebuttal argument. (Tr. IV, 109-11). The prosecutor began by stating that "this plan" of a drive-by shooting was "like a big steel ball . . . And so far who's given the ball two shoves? Defendant Hennon." (Tr. IV, 109). The prosecutor continued to use this "steel ball" analogy, arguing that "this accountability is like that steel ball and anybody that helped that steel ball go down that ramp or down that hill—" should be found guilty. (Tr. IV, 110-11). The Court of Appeals found that this argument was improper. (App. 5).

The prosecutor also stated in his rebuttal argument that Mr. Hennon's ownership of the car made him accountable: ". . . you have Adrian Hennon that [sic] provides the car that is used in this murder. Without that car, ladies and gentlemen, there is no murder. Without that car . . . Abdul Asad is still alive." (Tr. IV, 93). In response to defense counsel's objection, the court stated: "The court will indicate that counsel is making argument. The jury will find the facts based upon the evidence which the jury has heard." (Id.) The prosecutor went on to tell the jury: "What can you look at as to the defendant's accountability? You look at first his conduct before the commission of this offense and this is important. Who provided the car? The defendant." (Tr. IV, 105).

The prosecutor argued to the jury that defense counsel fabricated a defense and obstructed justice: "[defense counsel] want to put barriers in front of you in reaching your verdict" and "[t]hey want to take you off from what you have to do when you go back there to deliberate." (Tr. IV, 91). The prosecutor argued that "[w]hen you put a witness on the stand you're vouching for his credibility." (Tr. IV, 90). The prosecutor continued: "Another thing, counsel wants you to believe that this guy doesn't know anything that is going to happen" (Tr. IV, 94), "[t]hen he wants to tell you, that Mr. Burns comes up here and tells you that Adrian was horrified at what he saw." (Tr. IV, 97), and "[t]hen counsel wants you to believe . . . that they can get these two guys mixed up." (Tr. IV, 101).

The prosecutor also suggested that Mr. Hennon's choice of a jury trial was an indication of guilt: "He also

has a right to waive a jury and have Judge Cousins decide his guilt or innocence." (Tr. IV, 92). The Court of Appeals found that this argument was improper. (App. 5).

The prosecutor characterized Mr. Hennon's case as "another example of gang violence that goes on in our city every day. Gang violence at the hands of Adrian Hennon and his Disciple buddies." (Tr. IV, 30). The prosecutor went on to argue to the jury that "your verdicts will decide the type of conduct that your [sic] going to tolerate on the streets of our city." (Tr. IV, 41). In rebuttal argument, the prosecutor stated, "strength in numbers. That is how these gangs operate, like wolf packs." (Tr. IV, 94). The Court of Appeals found this argument "undoubtedly improper," (App. 5-6), relying upon this Court's decision in *Darden v. Wainwright*, 477 U.S. 168, 180 and n. 11 (1986), which prohibits prosecutors from calling defendants "animals".

In response to the 39 defense objections during the prosecutor's closing and rebuttal argument, the court sustained objections 16 times. However, at no time did the court specifically instruct the jury to disregard the objectionable comments the prosecutor had made.

During its deliberation, the jury sent the trial court judge a note asking: "In reference to 'legal responsibility' must the defendant know what crime is about to be committed in order to be responsible for its commission?" (Supp. Tr. Vol. 2, 63, 70). In response to the jury's question, the judge told them that they "should read and discuss the instructions in order to resolve the inquiry." (Supp. Tr. Vol. 2, 63).

D. The Decisions Below

The Illinois Appellate Court summarily dismissed the Petitioner's claim that the prosecutor's misconduct during closing argument deprived him of a fair trial, stating only that the possible effects of any improper argument were cured by the trial court's instructions. (App. 35). The United States District Court dismissed the petition without holding a hearing. (App. 11). The United States Court of Appeals for the Seventh Circuit affirmed the District Court's dismissal of Adrian Hennon's Petition for Habeas Corpus holding that even though the prosecutor had "exceeded the proper bounds of argument," (App. 6), it was unlikely that the prosecutor's misconduct affected the jury's verdict. (App. 1).

REASONS FOR GRANTING THE WRIT

A prosecutor's misconduct during closing argument can deny a criminal defendant a fair trial. *Darden v. Wainwright*, 477 U.S. 168 (1986). Implicit in this doctrine is the notion that the power given to a prosecutor at this stage of the trial is great and that it can be misused to mislead juries. The court below acknowledged the importance of ensuring that prosecutors stay within the bounds of proper argument: "Because a prosecutor is a public official charged with law enforcement, a jury is likely to repose greater trust in his arguments than in those of the defendant's lawyer." *Hennon v. Cooper*, 109 F.3d 330, 333 (1997). Thus it is clear that reviewing courts must step in when misstatements of law or fact by a prosecutor, or unduly inflammatory statements, lead juries to convict not on the evidence, but upon misrepresentations and appeals to prejudice made to them by prosecutors in closing argument. However, in this case,

and in many others like it where highly prejudicial and inflammatory comments are made by prosecutors during closing argument, the response of reviewing courts has been only to recognize the impropriety of the argument, not to realistically gauge the probable effect of the misconduct on the jury's verdict.[1] This Court should adopt a standard which requires that convictions be vacated when prosecutors purposefully and repeatedly mislead jurors regarding the facts and the law and when they repeatedly appeal to the passions and prejudices of the jury.

I.

BECAUSE APPELLATE COURTS ARE UNWILLING TO ENFORCE THE COMMANDS OF *DARDEN v. WAINWRIGHT*, DEFENDANTS ARE LEFT UNPROTECTED FROM PURPOSEFULLY IMPROPER CLOSING ARGUMENTS BY PROSECUTORS.

A. The Prosecutor's Closing Arguments In This Case Were Designed To Mislead And To Inflame The Passions Of The Jury.

The fact that appellate courts are unwilling to intervene when prosecutors engage in improper argument is

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[1] This is not to say that courts of appeals have completely ignored their responsibility for ensuring that prosecutors do not exceed the bounds of proper argument. Courts of appeals have been especially vigilant when prosecutors improperly comment on a defendant's post-arrest silence. *See e.g., Gravely v. Mills*, 87 F.3d 779 (6th Cir. 1996), *United States v. Cotnam*, 88 F.3d 487 (7th Cir. 1996), *cert. denied*, 117 S.Ct. 326. Circuit courts of appeals have also reversed convictions where prosecutors improperly inject race into the fact finding process, *United States v. Cannon*, 88 F.3d 1495 (8th Cir. 1996), and where prosecutors refer to evidence that was not admitted during trial. *United States v. Forlorma*, 94 F.3d 91 (2d Cir. 1996).

devastating to a Petitioner like Adrian Hennon, who can demonstrate that he was convicted after the prosecution repeatedly and purposefully went well beyond the bounds of proper argument. The conduct of the prosecutor in this case, as evidenced by the five portions of his argument found improper by the Seventh Circuit, demonstrate clear intent to turn the jury away from a dispassionate consideration of the evidence contained in the record. These were the arguments, condemned by the court below, that likely swayed the jury in its consideration of whether Adrian Hennon should be found accountable for the crime of murder:

(1) "Passengers in these drive-by murders get convicted all the time." (App. 4), *Hennon*, 109 F.3d at 332.

(2) Accountability is like a "steel ball and anybody that helped the steel ball go down that ramp" should be found guilty of murder. Here the Seventh Circuit Court of Appeals found that the prosecutor "made aiding and abetting sound like a strict liability crime." (App. 5), *id.* at 333.

(3) Reference to the defendant's choice of a jury trial over a bench trial: "He also has a right to waive a jury and have Judge Cousins decide his guilt or innocence." The Seventh Circuit found this statement to be "not only gratuitous but improper. . . ." (App. 5), *id.* at 333. Like a prosecutor's improper comment on a defendant's invocation of his right to remain silent, the prosecutor's reference to the defendant's choice of a jury trial was designed to convince the jury that the exercise of a constitutional protection conceded guilt.

(4) Calling the defendant a member of a "wolf pack." (App. 5), *id.* at 333. The Seventh Circuit Court of Ap-

peals found that this argument was improper under *Darden v. Wainwright*, 477 U.S. at 180 and n.11.

(5) The prosecutor asked the jury to convict in order to send a message: "your verdicts will decide the type of conduct you're going to tolerate on the streets of our city." The Seventh Circuit found that this remark by the prosecutor "could have been understood to be telling the jury to convict irrespective of Hennon's guilt or innocence, lest an acquittal be interpreted as a green light for street gangs and drive-by killings." (App. 5-6), *id.* at 333.

All of these improper arguments took place during rebuttal argument, when there could be no reply. They evidenced a coldly calculated, and ultimately successful, plan to fundamentally mislead the jury.

There was some evidence that these improper remarks caused actual confusion among the jurors about the legal standard to be employed in determining the Petitioner's guilt or innocence. During its deliberations, the jury sent a signal to the judge that it was confused by the prosecutor's improper closing argument, a fact that separates this case from all other recent cases involving the question of whether habeas relief should be granted to a prisoner claiming a denial of his right to a fair trial based upon prosecutorial misconduct in closing argument. This signal was a note from the jury to the judge asking whether the defendant had to "know what crime is about to be committed." (App. 6), *id.* at 334. It is not clear precisely what the note signified; the question was written by lay persons and may have indicated the jury was confused as to whether it was enough for Adrian Hennon to be found guilty if found to have been present in the car from which the shots were fired.

B. The Decisions of the Courts of Appeals Fail To Protect Defendants From Improper Closing Arguments By Prosecutors.

Despite the outrageous arguments made by the prosecutors, Adrian Hennon was denied relief because recent federal decisions reviewing state court trials in which argument well beyond the bounds tend to give short shrift to the commands of this Court in *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974) and in *Darden v. Wainwright*, 477 U.S. at 181.

The circuit courts of appeals have fashioned an approach to disposing of claims of denial of due process as the result of improper closing argument which places relatively little emphasis on the egregiousness of the prosecutor's misconduct and great weight on unverifiable guesses about whether the improper remarks were likely to have affected the outcome of the case, even when the prosecutorial misconduct is purposefully designed to move the jury from a careful and dispassionate consideration of the facts to an unreasoned an emotional response to the facts presented at trial. *See, e.g., United States v. Gainey*, 111 F.3d 834, 836 (11th Cir. 1997) (The prosecutor stated that the defendant's "residence was a drug den . . . Ladies and gentlemen, we live here in South Florida and we are very familiar with it by now." Although the court recognized that "[t]he prosecutor's comment in this case [drew] upon widespread community fears about drugs, and implie[d] that those fears can or should inform the process of assessing [the defendant's] guilt," the comments were held to be harmless error.); *United States v. Verna*, No. 95-5856, 1997 WL 249154, at *4-5 (4th Cir. May 14, 1997) (The prosecutor stated that the defendant had "'paraded into this courtroom today with three obviously well-coached witnesses.'" The

court held that "[a]lthough the prosecutor's arguments were improper, they do not, under the circumstances here presented, rise to the level that would require reversal."); *United States v. Tokars*, 95 F.3d 1520, 1540-41 (11th Cir. 1996), *cert. denied*, 117 S.Ct. 1328 (1997) (Defendants alleged that in closing argument, the prosecutor "appealed to the conscience of the community and made religious references." The court stated that "[a]lthough the prosecutors may have gone a bit overboard by bringing in two of the Ten Commandments and the public policy against drugs . . . the prosecutor's remarks did not prejudice the substantial rights of the defendants."); *Mack v. Caspari*, 92 F.3d 637, 643 (8th Cir. 1996), *cert. denied* 117 S.Ct. 1117 (1997) (Recognizing that it was improper for the prosecutor both to have referred to his own certainty of the defendant's potential dangerousness and to have referred to the defendant, on trial for assault, robbery, and armed criminal action, as a "killer," the court held that the defendant did not prove that absent these comments, the verdict would have been different.); *Preston v. Delo*, 100 F.3d 596, 602 (8th Cir. 1996) (In his closing argument at the penalty phase of a murder trial, the prosecutor asked: "'what do you do at the end of the day with the garbage you have accumulated? . . . You throw it out. You don't take it home and put it in your refrigerator.'" The court recognized that "[t]he prosecutor's garbage comment was mean-spirited and unnecessary; he should have confined himself to arguing the facts of the case . . . rather than employing a dehumanizing comparison of [the defendant] to a useless, discardable object." But again, the court held the comments to be harmless error.); *United States v. Frost*, 61 F.3d 1518, 1525 (11th Cir. 1995) *opinion withdrawn and superseded in part*, 77 F.3d 1319 (1996), *cert. granted,*

judgment vacated and remanded, No. 96-538, 1997 WL 256070 (May 19, 1997) (During closing argument, the prosecutor stated "What they did . . . and what they would have done to others is no different than what the Gestapo did in World War II. It is no different than what authorities in Third World countries do to the people under their protection." Despite these egregious assertions, the Eleventh Circuit Court of Appeals held that "[a]lthough . . . the prosecutor was ill-advised to make a reference to Nazi Germany during her closing argument . . . Appellants have not shown that any of the prosecutors remarks rendered their trial fundamentally unfair.")

C. If The Holding of *Darden v. Wainwright* Is Not Enforced By Federal Courts, Prosecutors Will Continue To Make Improper Closing Arguments.

If the current approach to assessing the impact of improper closing argument is allowed to continue, there will be no effective constraints placed upon prosecutors to adhere to the rules regarding closing argument. Merely condemning arguments as being improper, without more, will, in fact, encourage prosecutors to continue to make arguments which are designed to lead juries away from the evidence presented at trial.

The fact that prosecutors continue to ignore appellate courts' condemnation of their improper closing arguments, is borne out by the prosecutors' comments in Adrian Hennon's case and by the Seventh Circuit's continued (and futile) condemnation of arguments made by assistants in local prosecutors' offices. *See e.g., United States v. Morgan*, No. 96-3428, 1997 WL 225855, at *4 (7th Cir. May 6, 1997) (In closing argument, prosecutor

put jurors in state witness' place by asking how they would feel if they were called liars when they attempted to help police and implied that if the jury disbelieved the witness, citizens would be reluctant to come forward and testify. The court in *Morgan* stated "the government clearly violated the proscription against appealing to the jurors' emotions and inviting the jury to consider the social consequences of its verdict . . . [e]very trial lawyer should know that this kind of argument exceeds the bounds of propriety.")

By refusing to reverse convictions in which improper argument is made, courts of appeals encourage prosecutors to make improper arguments by effectively eliminating any risk that convictions will be reversed even in cases, like this one, where the prosecutor's remarks were clearly intended to mislead the jury.

In this case, the evidence was close as to the defendant's accountability for a "drive-by" shooting. The Court of Appeals found that the prosecutor overstepped the bounds of proper argument five times. The Seventh Circuit was clearly troubled by the nature and extent of the prosecutor's improper argument. Indeed, few recent court decisions by courts of appeals contain so many findings of prosecutorial misconduct. It should be a matter of deep concern therefore, that Adrian Hennon, who was the victim of such extensive prosecutorial overreaching during closing argument, was denied relief.

The prosecutor's misconduct in this case was clearly intended to lessen his burden of demonstrating accountability because he knew that the evidence was conflicting as to whether Adrian Hennon was accountable. A co-defendant had in fact admitted doing what the state accused Hennon of doing. The prosecutor's persistence in

making improper arguments after objections were made and sustained is ample evidence of the prosecutor's purposefulness in this regard. Allowing the Seventh Circuit's decision in this case to stand will send an unmistakable message to prosecutors that they are free to exceed the bounds of proper closing argument without the fear that the effects of their misconduct will be meaningfully scrutinized by reviewing courts.

D. This Court's Resolution of *Lindh v. Murphy* Will Not Require A Remand Of This Case.

The resolution of this case is somewhat intertwined with this Court's resolution of *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996) (en banc), *cert. granted* 117 S.Ct. 726 (1997). In *Lindh*, the Court of Appeals applied the Anti-Terrorism and Effective Death Penalty Act of 1996 to cases, such as this one, which had been filed before the effective date of the Act. *Id.* Anticipating possible reversal by this Court of the latter decision, *Hennon*, 109 F.3d at 334, the Court of Appeals applied preexisting standards of due process and harmless error to this case. It then went on to apply the Act's provisions, consistent with its holding in *Lindh*. If this Court reverses *Lindh*'s retroactivity holding, then this case is ripe for review based on the analysis that the Court of Appeals actually performed. If this Court affirms *Lindh*, then the further question of the "reasonableness" of the Illinois Court of Appeals application of Supreme Court precedent will be before this Court, an issue which the Court of Appeals also addressed and resolved against Petitioner. In neither case, will it be necessary to remand for further proceedings consistent with this Court's resolution of *Lindh*.

CONCLUSION

This case and others like it, where there are findings of substantial misconduct by prosecutors in closing argument and yet no relief granted, suggest that there is a compelling need for this Court to reaffirm its holding in *Darden*. *Darden v. Wainwright*, 477 U.S. 168 (1986). Adrian Hennon's case presents a compelling case for the proposition that harmless error cannot be presumed when a prosecutor intentionally and purposefully misstates the law, urges the jury to disregard the law, and appeals to the passions and prejudices of the jury. It is a good place to draw a much overdue line.

For the reasons set forth above, petitioner respectfully requests that the Court grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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June 11, 1997

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 96-1123

ADRIAN HENNON,

Petitioner-Appellant,

v.

KEITH COOPER, Warden,
Joliet Correctional Center,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 95 C 1279—**Marvin E. Aspen**, *Chief Judge.*

ARGUED JANUARY 10, 1997—DECIDED MARCH 14, 1997

Before POSNER, *Chief Judge*, and RIPPLE and DIANE P. WOOD, *Circuit Judges.*

POSNER, *Chief Judge.* Adrian Hennon was convicted in an Illinois state court in 1989 of first-degree murder and related crimes and was sentenced to 40 years in prison. After exhausting his state remedies, see *People v. Hennon*, 593 N.E.2d 587 (Ill. App.), app. denied, 602 N.E.2d 463 (Ill. 1992), he sought habeas corpus in federal district court, lost, and appeals, complaining primarily about the prosecutor's closing argument to the jury.

Gunshots from a passing automobile (a Chevrolet Nova) owned by Hennon killed a young boy named Abdullah Asad

and wounded a high school student named Jason Murray near a school in Chicago. A witness named Verrett testified that minutes before the shooting he saw Murray arguing with the occupants of a passing jeep that had brushed Murray. The occupants of the jeep threatened to return. They did, almost immediately, followed by Hennon's Nova. The occupants of the two vehicles, who included Hennon and Terrence Mack, got out and approached Murray, Verrett, and their pals and flashed a street-gang hand sign. The groups argued. Mack (according to Verrett) said, "Shoot him. Shoot him." Instead Hennon, Mack, and the rest of their group got back into the jeep and the Nova and drove off. The Nova returned shortly, however, and, according to Verrett, Hennon was driving. As the car slowed to 10 to 15 miles per hour, Mack leaned out of one of the car's windows with a pistol in his hand and fired eight times.

Three other members of Verrett's and Murray's group corroborated Verrett's testimony, specifically identifying Hennon as the driver of the Nova at the time of the shooting. The defendant was arrested shortly after the shooting—driving the Nova. He testified, however, that he had not been driving at the time of the shooting; that Richard Terrell had been. Terrell himself had said just this in a statement he had given to the police when he was arrested, and Hennon's lawyer was permitted to read the statement to the jury. Another witness backed up Hennon's testimony, and Terrell's statement, that Terrell, not Hennon, had been the driver at the time of the shooting.

Under Illinois law, an individual is legally accountable for the criminal conduct of another when he deliberately assists in planning or committing the crime. 720 ILCS 5/5-2(c). "Accountability" is thus just another word for aiding and abetting. *People v. Williams*, 641 N.E.2d 296, 329 (Ill. 1994); *People v. Robinson*, 458 N.E.2d 206, 208 (Ill. App. 1983). It was as an aider and abettor that Hennon was convicted of Asad's murder, and neither the sufficiency of the evidence nor the soundness of the instruc-

tions to the jury is in question. Hennon argues, however, that his Sixth Amendment right to defend himself was infringed by the trial judge's refusal to schedule Terrell's trial before Hennon's so that Terrell could testify in support of Hennon without fear of incriminating himself. The judge refused because his policy was to schedule trials of severed defendants in the order in which the defendants' names had appeared in the indictment. Terrell, slated under this system to be tried after Hennon, pleaded guilty to first-degree murder after Hennon's trial and was sentenced to 22 years in prison. He had not testified at that trial although as we mentioned Hennon's lawyer was allowed to read to the jury Terrell's statement to the police that he, not Hennon, had been driving at the time of the shooting.

Terrell might well have testified for Hennon if, having already been convicted and sentenced, he would no longer have feared incriminating himself by admitting under oath that he had been the driver. But the Constitution does not entitle state criminal defendants to insist that trials of codefendants following severance be conducted in the sequence best designed to obtain the acquittal of one or more of the defendants. (See *Mack v. Peters*, 80 F.3d 230, 235-36 (7th Cir. 1996), rejecting the identical argument by Hennon's other codefendant, and cases cited there.) Especially not in a case such as this where the codefendant's testimony is put before the jury in a more credible form than live testimony, which would be subject to cross-examination. Cf. *Van Harken v. City of Chicago*, 103 F.3d 1346, 1352 (7th Cir. 1997).

Hennon's more substantial ground of appeal concerns the prosecutor's closing argument, especially the rebuttal portion. The due process clause has been interpreted to forbid prosecutors to obtain jury verdicts by means of statements that are seriously misleading or that otherwise prevent the jury from deliberating rationally about the defendant's guilt. *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974); *Darden v. Wainwright*, 477 U.S. 168, 181 (1986); *United States ex rel. Shaw v. De Robertis*, 755 F.2d

1279, 1281-82 (7th Cir. 1985); *Miller v. Lockhart*, 65 F.3d 676, 683-84 (8th Cir. 1995); *Armour v. Salisbury*, 492 F.2d 1032, 1036-37 (6th Cir. 1974). Hennon complains that the prosecutor misled the jury about the elements of aiding and abetting and also made improper appeals to the jurors' emotions. The prosecutor told the jury that "passengers can be just as accountable as drivers. . . . So it really doesn't matter . . . if you . . . buy that he isn't the driver. . . . [H]e can be just as guilty if he's a passenger or if he's the driver." Hennon argues that the prosecutor was telling the jury that anyone who was a passenger in the car at the time of the shooting was an aider or abettor, and that would be incorrect; but this is not a necessary, or the most natural, reading of the prosecutor's statement. There was evidence that Hennon was an aider and abettor even if he was a passenger. He had been with Mack when the latter urged that Murray be shot and he had departed with Mack, in his own car, and had returned, with Mack and the others, again in his car. It was a reasonable inference that even if he was not driving, he was there to assist Mack in a plan to shoot Murray. But when the prosecutor added, "Passengers in these drive-by murders get convicted all the time," he went too far. He made it sound as if whenever there is a drive-by murder every occupant of the murder vehicle is an aider and abettor of the murder; and he might also have been understood to be inviting the jury to follow the lead of other juries rather than to make an independent assessment of the facts of this case.

We do not think the prosecutor exceeded the bounds of fair argument when he told the jury, "Without that car [Hennon's Nova], there is no murder." In context, this meant not that the owner of a car used in a crime is an aider and abettor, which would be preposterous—the car might have been stolen from him—but that supplying the car was a material form of assistance, which coupled with the evidence of intent warranted an inference of aiding and abetting. The defense had gone to great lengths during the trial to prove that Hennon had been a passenger,

rather than the driver, and so it was important for the prosecutor to emphasize to the jury that a passenger can be legally accountable for the crimes of another passenger.

But when the prosecutor added that accountability is like a "steel ball and anybody that helped the steel ball go down that ramp" should be found guilty of murder, specifically Hennon who according to the prosecutor had given the "ball two shoves" (owning the car and driving it), he again exceeded the bounds. He made aiding and abetting sound like a strict liability crime. One "shove" was just owning the car, and one shove was enough for liability, the prosecutor implied. But merely owning a car used to commit a crime does not, without more, make one an aider and abettor. The trial judge sustained the defendant's objection, however, and reminded the jury that he, the judge, would instruct them in the law.

The allegedly inflammatory comments are a series of comments that could be interpreted as impugning defense counsel's honesty (for example, defense counsel "want to put barriers in front of you in reaching your verdict," and "when you put a witness on the stand you're vouching for his credibility"), as implying that anyone who requests a jury is guilty ("He also has a right to waive a jury and have Judge Cousins decide his guilt or innocence"), as inviting the jury to convict Hennon in order to indicate their dislike of gang violence ("your verdicts will decide the type of conduct that you're going to tolerate on the streets of our city"), and as frightening the jury ("That is how these gangs operate, like wolf packs"). The first subset of comments, attacking defense counsel, although gratuitous, does not seem seriously prejudicial. The second comment, the one about Hennon's failing to waive his right to a jury trial, while not only gratuitous but improper, strikes us as maladroit rather than prejudicial, since it insults the jury by telling it that juries are more likely than judges to be fooled into acquitting guilty people. The comment about wolf packs might be thought within the bounds of fair comment, given that this is a case of murderous gang violence, cf. *Di Carlo v. United*

States, 6 F.2d 364, 368 (2d Cir. 1925) (L. Hand, J.), but is questionable in view of *Darden v. Wainwright*, *supra*, 477 U.S. at 180 and n. 11, where the Supreme Court said that calling the defendant an "animal" was undoubtedly improper. The comment about using the verdict to send a signal also disturbs us. While there is nothing wrong with asking the jury to convict a guilty person and by doing so make clear the jury's commitment to the rule of law, the prosecutor could have been understood to be telling the jury to convict irrespective of Hennon's guilt or innocence, lest an acquittal be interpreted as a green light for street gangs and drive-by killings.

Taken as a whole, which is the right way to take a series of questionable remarks by a prosecutor, the remarks that we have quoted and a few others to which the defense objected with rather less cause indicate that the prosecutor exceeded the proper bounds of argument. Because a prosecutor is a public official charged with law enforcement, a jury is likely to repose greater trust in his arguments than in those of the defendant's lawyer. The prosecutor must not abuse that trust by misleading the jury about the law or the evidence or about the probity of the defendant's lawyer, or by appealing to jurors' prejudices and fears. Cf. *Berger v. United States*, 295 U.S. 78, 88 (1935), overruled on other grounds, *Stirone v. United States*, 361 U.S. 212 (1960); 1 *ABA Standards for Criminal Justice*, Standard 3-5.8, pp. 3-87 to 3-91 (2d ed. 1980). But violations of this duty, even when they are so egregious as to come within range of the due process clause, justify vacating a conviction only if they are likely to have affected the verdict. Given the strength of the evidence against Hennon, this was most unlikely, especially since the judge sustained many objections to the prosecutor's closing argument and repeatedly reminded the jury that they must decide the case in accordance with the instructions that he, the judge, would be giving it.

Hennon places much weight on the fact that during its deliberations the jury sent the judge a question as to whether the defendant had to "know what crime is about to be committed." This shows, he argues, that the jury

was confused. The judge did not answer the question, so if the answer were "yes" Hennon might have a point. The answer, however, is clearly no. In order to be guilty of aiding and abetting the murder of Asad, Hennon didn't have to know that Mack was going to kill a bystander rather than Murray, *People v. Marshall*, 75 N.E.2d 310, 313 (Ill. 1947); cf. *People v. Homes*, 654 N.E.2d 662, 670 (Ill. App. 1995); didn't have to know that Mack was going to kill *anyone*, only that he was going to engage in the kind of extremely reckless conduct (shooting into a crowd) that constitutes murder if someone is killed, 720 ILCS 5/9-1(a)(2); *People v. Mitchell*, 601 N.E.2d 916, 919 (Ill. App. 1992); maybe only had to know that Mack was going to engage in *some* crime with Hennon's assistance, *People v. Terry*, 460 N.E.2d 746, 748-50 (Ill. 1984); *Brumley v. Detella*, 83 F.3d 856, 865 (7th Cir. 1996). This shows that the jury had not been misled by the prosecutor *to Hennon's detriment*. On the contrary, the jury seems to have been entertaining an erroneously *narrow* conception of aiding and abetting. If they were confused, they were confused in favor of the defendant.

We have discussed the issue of prosecutorial misconduct thus far as if we were reviewing the due process issue de novo, giving no weight to what the district judge or the state courts thought, and thus ignoring the amendments that the Antiterrorism and Effective Death Penalty Act of 1996 made to 28 U.S.C. § 2254. Proceeding in this fashion is simple prudence; although this court has held that the amendments are applicable to cases such as this filed before the statute was passed, *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996) (en banc), cert. granted, 117 S. Ct. 726 (1997), the issue is now before the Supreme Court, which may disagree with our resolution of it. But however the issue of retroactivity is resolved, the issue of the application of the amendments to cases of prosecutorial misconduct will continue to arise, so we shall go on and consider it.

The amendments provide, so far as bears on this case, that a federal court may not grant relief on a claim that

has been adjudicated by a state court unless that adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). There is no contention that the decision by the Illinois Appellate Court affirming Hennon's conviction is contrary to any decision by the U.S. Supreme Court, so we can set the first clause of (d)(1) to one side and ask: Did the Illinois court make an "unreasonable application" of federal law as clearly established by decisions of the Supreme Court? The decisions in question, *Donnelly* and *Darden*, established the principle that misleading and inflammatory argument by a prosecutor denies due process of law if it is likely to have swung the jury against the defendant. The application of the principle involves comparing it with the particular argument to which objection is made and the evidence of the defendant's guilt. Such a comparison is judgmental and the statute commands deference to the state court's judgment by using the word "unreasonable," which is stronger than "erroneous" and maybe stronger than "clearly erroneous." *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 623 (1993). Thus the fact that we might disagree with the state court's determination that the prosecutor's remarks did not deny Hennon due process because they are unlikely to have swayed the jury—might think the determination incorrect—would not carry the day for him. It should be plain from our earlier remarks that we do not think Hennon can meet this demanding standard.

Another way to take "unreasonable" in the new law, however, is as having reference to the quality of the reasoning process articulated by the state court in arriving at the determination. On this approach federal judicial review of a state court's determination of an issue of constitutional law arising out of a criminal proceeding is similar to judicial review of an administrative agency's decision, where courts insist not only that the outcome be reasonable in relation to the evidence but that the

agency articulate a rational path connecting the law and the evidence to the outcome. E.g., *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983); *Madison Gas & Elec. Co. v. EPA*, 25 F.3d 526, 529 (7th Cir. 1994); *Bastanipour v. INS*, 980 F.2d 1129,1131 (7th Cir. 1992). This approach might cause trouble for the state here, because the state court's discussion of the prosecutor's remarks was perfunctory. See 593 N.E.2d at 591.

But we do not think the approach is correct. It would place the federal court in just the kind of tutelary relation to the state courts that the recent amendments are designed to end. It would be less appropriate than in the parallel area of administrative review, where the court can remand the case to the administrative agency for a better articulation of its grounds. *SEC v. Chenery Corp.*, 318 U.S. 80, 94-95 (1943); *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 653-54 (1990); *Gallo v. Amoco Corp.*, 102 F.3d 918, 923 (7th Cir. 1996). A federal court in a habeas corpus proceeding cannot remand the case to the state appellate court for a clarification of that court's opinion; all it can do is order a new trial, though the defendant may have been the victim not of any constitutional error but merely of a failure of judicial articulateness.

We are mindful of language in the *Lindh* opinion that might appear to support the approach in cases such as this in which the issue is unreasonable application of clearly established federal law, rather than what that law is. The opinion compares the federal district court's role in a habeas corpus proceeding to appellate review of a discretionary ruling by a trial court, and notes that the appellate court gives "greater weight to thoughtfully reasoned decisions." 96 F.3d at 877; see also *id.* at 871. And it commends the state appellate court for having written a "careful" opinion. *Id.* at 877. But all that was intended by these observations (for earlier the opinion had expressly rejected the analogy to review of administrative action, *id.* at 868) is that *of course* the better the job the state

court does in explaining the grounds for its rulings, the more likely those rulings are to withstand further judicial review. That is just realism. It doesn't follow that the criterion of a reasonable determination is whether it is well reasoned. It is not. It is whether the determination is at least minimally consistent with the facts and circumstances of the case. Which it was here, however deficient the discussion of the reasons for so believing by the state appellate court.

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

App. 11

No. 95 C 1279

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES of America
ex rel. Adrian HENNON,

Plaintiff,

v.

Keith COOPER,
Warden, Joliet Correctional Center,

Defendant.

Dec. 27, 1995.

CHIEF JUDGE ASPEN DELIVERED THE OPINION OF THE COURT:

Petitioner Adrian Hennon brings this pro se action against Respondent Keith Cooper, Warden of the Joliet Correctional Center, seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Hennon is serving a forty year imprisonment term for first-degree murder, among other offenses, arising from his participation in a "drive-by" gang shooting. In support of his petition, Hennon raises two grounds: (1) prosecutorial misconduct during closing argument violated his right to due process; and (2) the trial judge failed to schedule the trial of a codefendant to start before Hennon's trial in order to encourage the codefendant to testify at Hennon's trial. For the reasons set forth below, we deny the petition.

I. Background

At trial, the State offered evidence proving the following facts. During the afternoon of September 9, 1988, gunshots were fired by a passenger in Hennon's Chevrolet Nova, killing Abdullah Asad and wounding Jason Murray as they were standing in Stoney Island Park near Chicago Vocational High School. The kindle for the shooting was lit earlier that day, when Murray was crossing a street adjacent to the park in order to rejoin his friends, Elward Verrett, Devon Miller, Esau Asad, and Darren Harris. The driver of a jeep traveling on the street, apparently believing that Murray was too close for comfort, sounded the jeep's horn. Tr. II, 112.[1] As Murray reached the other side, the jeep's occupants and the group in the park quarreled briefly, ending with one of the jeep occupant's warning, "we'll be back," Tr. I, 85, 147.

The jeep soon returned, followed by Hennon's car. Some individuals, including Hennon, exited the vehicles, flashed gang signs, and argued with Murray and his friends. Tr. I, 87-88; Tr. II, 13. One of the gang members, Terrance Mack, yelled "shoot him" and "pop him." Tr. I,

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[1] The parties cite to the trial transcript by referring to an in seriatim page numbering system that appears only on part of the transcript filed in the court. Although we have been able to find the cited pages, the parties' numbering system apparently does not extrapolate exactly to the unnumbered portions of the transcript. For clarity's sake, we will cite transcript pages according to the page numbers for each trial day and will number the specific day's transcript as follows: (I) October 10, 1989; (II) October 11, 1989; (III) October 13, 1989; (IV) October 16, 1989; and (V) morning session, November 13, 1989. For citations to the Supplemental Transcript, we will cite to the stamped page number.

88; Tr. II, 115. No one fired—at that time—and the gang drove away. However, the Nova soon returned. The car slowed as it passed by Murray and his friends, and approximately eight shots were fired from the car. Tr. I, 92-94. Approximately ten minutes after the shooting, police officers spotted the Nova driving in the area. Tr. II, 172-73. The car stopped briefly, Mack and Richard Terrell exited and fled, but were soon arrested. Tr. II, 176-78. A short distance away, Hennon was arrested while driving the Nova. Tr. II, 179.

At a lineup later that day, Verrett identified Mack, Hennon, and Terrell as the Nova's occupants. Tr. I, 96. Specifically, Verrett, as well as Miller and Harris, identified Mack as the gunman. Tr. I, 96; Tr. II, 17-18, 77. At trial, Verrett, Asad, Miller, and Harris identified Mack as the gunman. Tr. I, 92, 154; Tr. II, 14, 75-76. Verrett and Miller also testified that Mack fired the shots from the Nova's front passenger seat, Tr. I, 92; Tr. II, 35, although Miller admitted that, prior to trial, he had told the defense that the shots came from the Nova's back seat, Tr. II, 36.[2] Also at trial, Verrett, Asad, Miller, and Harris identified Hennon as the Nova's driver, Tr. I, 92, 154-55; Tr. II, 15, 75, although Miller admitted that, prior to trial, he had told the defense that he could not remember whether a person fitting Hennon's description was sitting in the front passenger seat or was instead driving. Tr. II, 40-42. While testifying in his defense, Hennon claimed that Terrell was driving the Nova at the

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[2] Mack was tried concurrently with Hennon, but to a separate jury; he was convicted and sentenced to sixty years imprisonment. After two days in a later trial, Terrell pleaded guilty and was sentenced to twenty-two years imprisonment.

time of the shooting, and that Hennon was riding in the front passenger seat. Tr. III, 180. Hennon explained that, earlier in the day, Terrell asked for a ride to the local store. Tr. III, 171. After visiting the store, they refueled at a gas station, where Terrell asked for permission to drive in order to find Mack. Tr. III, 171. Terrell drove them to Mack's neighborhood, where they found Mack. Eventually, Mack offered to pay for yet more gas, and Terrell drove toward a gas station. Tr. III, 173. The trio encountered the jeep and its occupants, Mark Watts, Terrance Jobe, and Harron Binwalee. Tr. III, 174. Upon request, Terrell followed the jeep to Stoney Island Park. Tr. III, 176. Watts, Jobe, Binwalee, and Mack exited to have their argument with Murray and his friends; when they returned, Jobe climbed into the Nova's back seat in place of Mack. Tr. III, 177. Mack, now in the jeep, told Terrell and Hennon to meet him at his house after Terrell fueled the Nova. Tr. III, 179. After stopping at the gas station, Jobe asked Terrell to drive to a fast-food restaurant. Tr. III, 180. Terrell again drove by the park, and Jobe started shooting. Tr. III, 181.

At that time, Hennon testified, Terrell and Hennon told Jobe to get out; Jobe asked them to drop him off at a specific intersection. Tr. III, 182. When they arrived, the jeep was there and Jobe exited the Nova. Tr. III, 183. Terrell drove a short distance, and then Hennon said that he wished to drive. Tr. III, 183. After trading places, Hennon found Mack and informed Mack of the shooting. Tr. III, 183. It was at this time that the police spotted the Nova.

In support of his version of the shooting, Hennon introduced a statement given by Terrell to the police the day after the crime. Terrell reported that he was driving the

Nova at the time of the shooting; however, Terrell stated that Mack, not Jobe, fired the shots. Tr. III, 220. According to Terrell's statement, they then drove to Mack's house. Tr. III, 220. When they left, Hennon drove, Tr. III, 221, thus explaining why Hennon was driving when the police arrested them. Finally, Mark Watts, one of the jeep's occupants, testified that Terrell was driving when the jeep and the Nova proceeded to Stoney Island Park. Tr. III, 86.

Ultimately, the jury convicted Hennon for first-degree murder, attempted first-degree murder, aggravated battery, and armed violence. Hennon was sentenced to forty years imprisonment. After unsuccessfully pursuing direct appeals, People v. Hennon, 593 N.E.2d 587 (III. App. Ct.), appeal denied, 602 N.E.2d 463 (III. 1992). Hennon brings this petition for a writ of habeas corpus, arguing that prosecutorial misconduct during closing argument violated his right to due process and that the trial court should have scheduled his trial after Terrell's trial in order to encourage Terrell to testify on Hennon's behalf. For the reasons discussed below, we deny the petition.

II. Prosecutorial Misconduct

Hennon complains that the prosecutor's closing argument violated Hennon's right to due process by: (1) misstating the law of accountability; (2) insinuating that the defense sought to mislead the jury; (3) suggesting the existence of evidence not introduced at trial; (4) implying that Hennon opted for a jury trial in order to avoid conviction; (5) suggesting that the jury could convict Hennon because passengers in other drive-by shootings had been convicted; and (6) urging the jury to enter a conviction for its social impact rather than on the evidence.

In determining whether the prosecutor's remarks demand granting the writ, we inquire whether "the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Darden v. Wainwright, 477 U.S. 168, 181 (1986) (quoting Donnelley v. DeChristoforo, 416 U.S. 637, 643 (1974)). We approach the inquiry in two steps:

> [First,] [w]hen analyzing allegations of prosecutorial misconduct during argument, we look at the disputed remarks in isolation to determine if they are proper. If the statements are proper, our analysis ends. If the statements are improper our second step is to look at the remarks in light of the entire record to determine if the defendants were deprived of a fair trial.

United States v. Reed, 2 F.3d 1441, 1450 (7th Cir. 1993) (quoted by Rodriguez v. Peters, 63 F.3d 546, 558 (7th Cir. 1995)), cert. denied, 114 S. Ct. 898 (1994). The defendant has been "deprived of a fair trial" where "'it is at least likely that the misconduct complained of affected the outcome of the trial—i.e., caused the jury to reach a verdict of guilty when otherwise it might have reached a verdict of not guilty.'" Rodriguez, 63 F.3d at 558 (quoting United States ex rel. Shaw v. De Robertis, 755 F.2d 1279, 1281 n.1 (7th Cir. 1985)).[3] We evaluate the impact

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[3] We acknowledge that prior cases place upon the petitioner the "burden" of showing that improper remarks affected the trial's outcome, e.g., Shaw, 755 F.2d at 1281 n.1. However, the Supreme Court recently held that, in those few cases where the record reflects that the harmlessness vel non of a constitutional error is an "evenly balanced" question, the habeas petitioner must win. O'Neal v. McAninch, 115 S. Ct. 992, 995 (1995) (holding that petitioner should prevail where district

(continued...)

of the prosecutor's improper comments by considering five factors:

> (1) the nature and seriousness of the prosecutorial misconduct, (2) whether the prosecutor's statements were invited by conduct of defense counsel, (3) whether the trial court instructions to the jury were adequate, (4) whether the defense was able to counter the improper arguments through rebuttal, and (5) the weight of the evidence against the defendant.

Id. (quoting Reed, 2 F.3d at 1450 (citations omitted)). Finally, the weight of the factors vary from case-to-case and defy rigid formulas, although "'proof of guilt'" has been labeled the "'most important factor to be considered.'" Id. (quoting United States v. Gonzalez, 933 F.2d 417, 431-32 (7th Cir. 1991)).

A. Law of Accountability

Hennon complains that the prosecutor made several remarks that misstated the law of accountability in Illinois. In accordance with the criminal code in effect at the time of Hennon's conviction, III. Rev. Stat. ch. 38, P 5-2 (1987), the trial judge instructed the jury that

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[3] (...continued)
court is in "grave doubt" over whether the constitutional error substantially influenced the verdict). O'Neal involved an alleged due process violation based on the confusion caused by the combination of a jury instruction and a prosecutor's statements, so it is unclear whether O'Neal now places the risk of nonpersuasion on the State in cases based solely on the prosecutor's comments. We need not decide this question in the instant case, however, because we are not in "grave doubt" over the harmlessness of the allegedly improper remarks; rather, we are "fair[ly] assur[ed]" that the remarks did not substantially influence the verdict. See id.

> [a] person is legally responsible for the conduct of another person when, either before or during the commission of an offense, and with the intent to promote or facilitate the commission of that offense, he knowingly solicits, aids, abets, agrees to aid, or attempts to aid the other person in the planning of commission of the offense.

Supp. Tr. 36. In order for a defendant to be held accountable for the offense of another, the defendant must share a "'common purpose'" with the other offender. Rodriguez, 63 F.3d at 563 (quoting People v. Ruiz, 447 N.E.2d 148, 151 (III. 1982), cert. denied, 462 U.S. 1112 (1983)).

The petitioner first complains of the prosecutor's initial attempt to explain the law of accountability:

> The judge will instruct you onto the law . . . of legal responsibility. Pay close attention to that law. It's your duty to follow that law whether you like it or not. . . . It's the law that recognizes teamwork.
>
> [DEFENSE COUNSEL]: Objection, Judge.
>
> THE COURT: The court sustains the objection.
>
> [PROSECUTOR]: The power in numbers—
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: The court will indicate counsel may make argument based on the evidence.

Tr. IV, 33-34. We decline to label these remarks as improper. "[A]ttorneys can, and necessarily must, state what they believe the law to be and base their arguments as to the facts on this interpretation." People v. Glasco, 628 N.E.2d 781, 784 (III. App. Ct. 1993) (citing Coyne v. Avery, 59 N.E. 788 (III. 1901)). Here, the prosecutor's explanation expressed a view of the law consistent with the law of accountability. See People v. Flem-

ing, 347 N.E.2d 193, 194 (III. App. Ct. 1976) (holding defendant responsible for robbery because "[t]he youths worked as a team and each one was accountable for the acts of the others"). In addition, we think that the prosecutor's explanation that accountability recognizes "teamwork" and the "power in numbers" suggests, rather than denigrates, the requirement that the defendant intend to facilitate the crime. Accordingly, these initial comments were proper.[4]

Next, Hennon argues that the prosecutor suggested that ownership of the Nova was sufficient to hold the defendant accountable. Specifically, the prosecutor in rebuttal stated:

> And you have Adrian Hennon that is out on the street, a Adrian Hennon that provides the car which is used in this murder. Without that car . . . there is no murder. Without that car—
>
> [DEFENSE COUNSEL]: Objection, Judge.
>
> [PROSECUTOR]: —Abdul Asad is still alive.

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[4] Even if the references to "teamwork" and "power in numbers" were improper, we conclude that these statements did not affect the trial's outcome. The trial court sustained objections to the statements, Tr. IV, 33-34, and contemporaneously admonished the jury that "[t]he court will instruct the jury as to the law," Tr. IV, 34. Indeed, the prosecutor prefaced his remarks by acknowledging that "[t]he judge will instruct you onto the law." Tr. IV, 33. Furthermore, the jury instructions expressed the law of accountability, Supp. Tr. 36, and we generally presume that juries follow instructions, Lee v. McCaughtry, 892 F.2d 1318, 1325 (7th), cert. denied, 497 U.S. 1006 (1990). Finally, there existed a wealth of evidence against Hennon, see supra Part I, and conclude that the petitioner was not deprived of a fair trial.

> THE COURT: The court will indicate that counsel is making argument. The jury will find the facts based upon the evidence which the jury has heard.

Tr. IV, 93. We perceive no impropriety in these statements. The prosecutor did not link these remarks to the standard for accountability. In fact, the prosecutor was addressing defense testimony that portrayed Hennon as a peaceful person who attended Sullivan House, a special education high school, Tr. III, 162-64, by arguing that Hennon "leads two lives. He has one he has over at Sullivan House. . . . And you have Adrian Hennon that is out on the street," Tr. IV, 93. Thus, we find these remarks to be proper.[5] Third, the petitioner contends that the prosecutor suggested that intent was not required for accountability by arguing:

> And Ricky Terrell. Counsel made all these . . . statements about it was given to a police officer the next day, he admits to driving. Well, first of all passengers in these drive-by murders get convicted all the time.
>
> [DEFENSE COUNSEL]: Objection, Judge. Move for a mistrial.
>
> THE COURT: The court will sustain the objection. Counsel may make argument based on the evidence.
>
> [PROSECUTOR]: Excuse me. Passengers can be just as accountable as drivers.
>
> [DEFENSE COUNSEL]: Objection, Judge.

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[5] We note that, assuming the statements regarding the car to be improper, the statements did not deprive Hennon of a fair trial. The trial court's instruction on accountability expressly required intent to promote or facilitate, and the instruction could not possibly be read so that ownership of the Nova alone would suffice to meet the standard. Supp. Tr. 36.

> THE COURT: The court will sustain the objection. The court will instruct the jury as to the law.

Tr. IV, 103. To the extent that Hennon contends that these remarks misstated the law of accountability, we hold otherwise.[6] The prosecutor's self-revised statement that "[p]assengers can be just as accountable as drivers," did not invite the jury to find Hennon accountable solely because he was, under the defense's theory of the case, a passenger in the Nova. Rather, the prosecutor accurately stated that passengers as well as drivers "can be" held accountable.[7]

Finally, Hennon maintains that the prosecutor misstated the law of accountability by describing the events surrounding the shooting as a "big steel ball," Tr. IV, 109, and then later asserting:

> And remember that this accountability is like that steel ball and anybody that helped that steel ball go down that ramp or down that hill—
>
> [DEFENSE]: Objection, Judge.
>
> THE COURT: The court will instruct as to the law. Counsel may continue to argue as to the evidence. The objection will be sustained.

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[6] To the extent that the petitioner complains that these remarks improperly urged conviction based on the results of other cases, we discuss this contention infra Part II.E.

[7] Again, even if improper, this characterization of accountability did not affect the trial's outcome. The jury instructions did not refer to the defendant's status as a passenger or driver as such, but rather provided the jury with a self-explanatory statement of the law. Supp. Tr. 36. Moreover, the trial judge sustained objections and contemporaneously admonished the jury that the trial judge would instruct them on the law. Tr. IV, 103.

Tr. IV, 111. We conclude that it was improper for the prosecutor to directly define accountability to mean that any person could be held accountable for merely starting or participating in the chain of events leading up to the shooting. Indeed, the prosecutor described the act of driving to Chicago Vocational High School as giving the "steel ball . . . a little shove down the hill." Tr. IV, 109. Thus, the prosecutor depicted accountability as measured solely by a causal standard, even though the criminal code requires intent to promote or facilitate the specific offense for which the defendant is purportedly accountable.

However, it is unlikely that this mischaracterization affected the trial's outcome. Although the defense did not have an opportunity to respond to the prosecutor's description, the trial court sustained the defense's objection to the explanation, and immediately admonished the jury that the court would provide instructions on the law. Tr. IV, 111. And the trial court's instruction did express the "intent to promote or facilitate" requirement. Supp. Tr. 36.[8] Furthermore, the prosecution offered strong evidence as to Hennon's accountability. See supra, Part I. Among other things, the State introduced testimony that the Nova's driver slowed the car just before the shooting and

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[8] It is true that, during deliberations, the jury sent the trial court a note asking, "Must the defendant know what crime is about to be committed in order to be responsible for its commission?" Supp. Tr. 63. The trial court instructed the jury to continue deliberations, pointing out that the jury should read the instructions to find the answer. Id. Because the instructions did indeed provide the answer, we cannot conclude that the jury's query shows that the prosecutor's mischaracterization likely affected the verdict.

four eyewitnesses that identified Hennon as the Nova's driver. In addition, no more than fifteen minutes after the shooting, Hennon was arrested while driving the Nova. Terrell's purportedly exculpatory version of the events lost probative force by actually contradicting Hennon's testimony; namely, Terrell stated that Mack, not Jobe, fired the shots. In sum, we hold that the prosecutor's "steel ball" analogy did not deprive the petitioner of a fair trial.

B. Misleading the Jury

Next, Hennon contends that the prosecutor accused the defense of misleading the jury. The petitioner points to several remarks made during rebuttal where the prosecutor expressed that "they"—the defense—"want[ ] you to believe that this guy doesn't know anything is going to happen," Tr. IV, 94, "tell[ ] you that Adrian was horrified at what he saw," Tr. IV, 97, and "want[ ] you to believe that they can get these two guys mixed up," Tr. IV, 101. For the most part, these remarks accurately reflected the petitioner's theory of the case, and we discern no impropriety in them.

However, the prosecutor also stated that "they" "want to put barriers in front of you in reaching your verdict," and "want to take you off from what you have to do." Tr. IV, 1415. While a prosecutor is "free to draw any reasonable inference from the evidence adduced at trial," United States v. Spivey, 859 F.2d 461, 466 (7th Cir. 1988), "'characterization of a defense as fabricated'" or "reference[s] . . . to the defense theory as an illusion" may be improper, Lindgren v. Lane, 925 F.2d 198, 204-05 (7th Cir. 1988) (quoting United States v. Craig,

573 F.2d 455, 494 (7th Cir. 1977), cert. denied, 439 U.S. 820 (1978)), cert. denied, 502 U.S. 831 (1991).

In the instant case, however, we conclude that the prosecutor's remarks, even if improper, did not deprive Hennon of a fair trial. See id. (holding no denial of due process even though prosecutor asserted that the defense lawyer pulled out "these inconsistencies like a magician pulls rabbits out of his hats," such that the defense lawyer was trying to "trick" the jury by presenting "illusions"); see also Pierson v. O'Leary, 959 F.2d 1385, 1388 (7th Cir.) (holding no denial of due process where prosecutor accused defense of "trying to keep the whole truth from you"), cert. denied, 113 S. Ct. 168 (1992). Taken in context—the prosecutor had just contrasted the State's straightforward case against the defense's inconsistent and complicated theory—the remarks could be construed as an unartful way of urging the jury not to be distracted by the unbelievable defense witnesses. Tr. IV, 90-91. Furthermore, Hennon objected to the comments, and the trial court immediately reminded the jury to disregard any statements not based on the evidence. Tr. IV, 91. Similarly, the final jury instructions charged that closing arguments "should be confined to the evidence and to reasonable inferences to be drawn from the evidence," and that closing arguments do not constitute evidence. Supp. Tr. 29. Finally, the evidence weighed heavily against Hennon's version of the events. Accordingly, the prosecutor's disparagement of the defense did not deprive Hennon of a fair trial.

C. Manufacturing Evidence

Hennon next contends that the prosecutor misled the jury by implying the existence of evidence not introduced at trial. During the State's rebuttal argument, the prosecutor addressed the defense's theory, see Tr. IV, 79, that the State's witnesses lied in order to convict Hennon:

> [PROSECUTOR]: He wants you to believe that they kind of got together, Elward Verrett and the boys, and said you know, guys, you know the theory of accountability is somebody's the driver, they go down on a murder. Let's put it on Adrian Hennon. Come on. They told the police and counsel knows what they told the police about who the driver is.
>
> [DEFENSE COUNSEL]: Objection, objection.
>
> THE COURT: The court will indicate the court will sustain the objection. Counsel may continue to make argument based on the evidence in the case.

Tr. IV, 100. Thus, according to Hennon, the prosecutor asserted that the State's witnesses "told the police about who the driver is" when in fact the evidence did not support that assertion.

Although a prosecutor is "free to draw any reasonable inference from the evidence adduced at trial," Spivey, 859 F.2d at 466, "counsel cannot rely or comment on facts not in evidence during closing argument," United States v. Henry, 2 F.3d 792, 795 (7th Cir. 1993). In this case, however, Chicago police officer William Higgins testified that Verrett did indeed describe the driver during an interview on the day of the shooting, Tr. III, 32-33; the description accurately portrayed Hennon at the time of the shooting. In addition, witnesses testified that they identified Hennon in a lineup as one of the

Nova's occupants, Tr. I, 96, 160; Tr. II, 17, 85, and based on the witnesses' testimony at trial that Hennon was the driver, the prosecutor could accurately state that they "told the police about who the driver is." We conclude that evidence supported the prosecutor's remarks.[9]

D. Exercise of Right to a Jury Trial

The petitioner additionally argues that the prosecutor insinuated that Hennon chose a jury trial, rather then a bench trial, because he was guilty. During rebuttal, the prosecutor argued:

> [PROSECUTOR]: [L]et's go to the different issues raised by the defense counsel. And I think the very last one he reached about the jury system, yes, he has a right to a jury. He has a right to a fair trial. He has a right to be represented by competent counsel which he has been. He has a right to confront his accusers which he has done. He also has a right to waive a jury and have Judge Cousins decide his guilt or innocence.
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Court will sustain the objection. Counsel may continue to make arguments based on the evidence.

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[9] Even if the remarks could be construed as not based on the evidence, we hold that it is unlikely that they affected the trial's outcome. The trial court sustained the defendant's objection to the remarks, and advised that the prosecutor "may continue to make argument based on the evidence." Tr. IV, 100. In addition, we presume that the jury followed its instructions, which included a warning that closing arguments do not constitute evidence. Supp. Tr. 36.

Tr. IV, 92. We ascertain no impropriety in these remarks. The prosecutor did not connect Hennon's choice of a jury trial to his guilt. Rather, based on the prosecutor's discussion, the remarks merely catalogued the defendant's rights and represented the prosecutor's view that the defendant had received the fair trial that he chose. Thus, the remark regarding the waiver of a jury trial provides no basis for habeas relief.[10]

E. Reliance on Other Cases as a Basis for Conviction

Next, Hennon argues that the prosecutor suggested that the jury could convict the defendant based on convictions of passengers in other drive-by shooting cases. Specifically, in arguing for Hennon's guilt even if he was the Nova's passenger rather than the driver, the prosecutor argued:

> And Ricky Terrell. Counsel made all these . . . statements about it was given to a police officer the next day, he admits to driving. Well, first of all passengers in these drive-by murders get convicted all the time.
>
> [DEFENSE COUNSEL]: Objection, Judge. Move for a mistrial.
>
> THE COURT: The court will sustain the objection. Counsel may make argument based on the evidence.

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[10] Nor did the jury waiver comment affect the trial's outcome, even if improper. The trial court sustained an objection to the comment, and the prosecutor immediately moved onto another topic. Tr. IV, 92. In addition, the weight of the evidence against Hennon removes any doubt that the passing reference to Hennon's right to a bench trial affected the verdict.

> [PROSECUTOR]: Excuse me. Passengers can be just as accountable as drivers.

Tr. IV, 103. This latter remark was met by another objection, which the trial court sustained; the judge then admonished the jury that the court would instruct them on the law. Id.

We conclude that the prosecutor improperly referred to convictions of passengers in other drive-by shootings; that reference did not reflect any evidence in the record. However, we believe it unlikely that the reference deprived Hennon of a fair trial. First, the trial court sustained an objection to the remark. In addition, the prosecutor quickly revised his own statement by explaining, "Excuse me. Passengers can be just as accountable as drivers," Tr. IV, 103, an accurate interpretation of the law of accountability. The defense's successful objection and the prosecutor's quick revision, as well as the weight of the evidence against Hennon, suggest that the reference to other verdicts unlikely affected the trial's outcome.

F. Inflammatory Remarks

Finally, Hennon maintains that the prosecutor inflamed the jury's passion by referring to the social consequences of the verdict and to gang violence. The petitioner points out two statements made by the prosecutor, one in the State's initial closing argument and one in rebuttal argument: "Your verdicts will decide the type of conduct that you're going to tolerate on the streets of our city," Tr. IV, 41, and "strength in numbers. That is how these gangs operate, like wolf packs," Tr. IV, 94.

As to the first remark, it is true that "[c]omments that invite conviction for reasons other than because the defendant was proven guilty beyond a reasonable doubt are improper." United States v. Severson, 3 F.3d 1005, 1015 (7th Cir. 1993) (urging conviction for the "preservation of civil order"); see also United States v. Badger, 983 F.2d 1443, 1456 (7th Cir.) (arguing for conviction in order to "send a message"), cert. denied, 113 S. Ct. 2391 (1993). In the instant case, however, the prosecutor's suggestion regarding the conduct that the jury should tolerate did not affect the trial's outcome. Cf. Severson, 3 F.3d at 1015; Badger, 983 F.2d at 1456. The prosecutor made the remark in the initial closing argument, and thus the defense had an opportunity to respond to the statement. Indeed, the remark came as a rhetorical flourish to conclude the prosecutor's initial closing argument, and the jury more likely than not viewed it as such.[11] Furthermore, the trial court sustained an objection to the comment, Tr. IV, 1365, and expressly instructed the jury at the end of trial that the verdict must be based only on the evidence as applied to the facts, Supp. Tr. 25. Finally, the weight of the evidence against Hennon convinces us that the prosecutor's remark did not affect the outcome. As for the portrayal of street

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[11] We note too that the prosecutor's comment might be construed as an attempt to express the severity of the charges to the jury. See United States v. Zanin, 831 F.2d 740, 743 (7th Cir. 1987) (prosecutor may "impress upon the jury the seriousness of the charges and a comment on the gravity of the drug problem in the country is certainly not inappropriate") (quoting United States v. Zylstra, 713 F.2d 1332, 1340 (7th Cir.), cert. denied, 464 U.S. 965 (1983)); cf. United States v. Anderson, 61 F.3d 1290, 1299 n.6 (7th Cir.), cert. denied, 64 U.S.L.W. 3379 (U.S. Nov. 27, 1995) (No. 95-6485).

gangs as "wolf packs," we cannot conclude that the statement was so inflammatory as to deprive the petitioner of due process. Cf. Shepard v. Lane, 818 F.2d 615, 621-22 (7th Cir.) (no denial of due process even though prosecutor called the petitioner "a liar, a dog, and an animal," and wished that police officers had killed the petitioner), cert. denied, 484 U.S. 929 (1987). The trial court promptly sustained Hennon's objection to the remark, Tr. IV, 94, and later reminded the jury that "[n] either sympathy [n]or prejudice should influence you," Supp. Tr. 25. Therefore, we hold that the "wolf pack" and gang violence remarks did not affect the outcome.

III. Trial Schedule

The petitioner's second contention in support of the petition is grounded in the trial court's decision to hold Hennon's trial prior to Terrell's. Prior to Hennon's trial, the petitioner requested that the trial court try Terrell, and thereafter try Hennon. Supp. Tr. 20. In those circumstances, Hennon reasoned, Terrell would have been willing to testify for the defense in Hennon's trial; in particular, Terrell purportedly would have been willing to testify that, consistent with his statement to the police, Terrell was the Nova's driver. The trial court denied the request, explaining that the court would proceed in its usual manner by scheduling the defendants' trials according to their order of appearance in the indictment. Supp. Tr. 20. When the petitioner renewed its objection after the trial, the court also explained that, in order to promptly dispose of cases on its docket, the court scheduled trials according to a set procedure. Tr. V, 5-6. Hennon complains that "the trial judge utterly refused to

exercise any discretion in ordering the trials." Pet.'s Reply at 20.

We observe first that continuances are generally a matter within a trial court's discretion. United States ex rel. Searcy v. Greer, 768 F.2d 906, 912 (7th Cir.), cert. denied, 474 U.S. 996 (1985); see also United States v. Poston, 902 F.2d 90, 97 (D.C. Cir. 1990) (trial court has discretion "[i]n considering a continuance motion based upon an asserted need for a codefendant's testimony"). In determining whether to grant a habeas petition, "[o]nly an abuse of that discretion has been held to violate one's right to due process and result in a fundamentally unfair trial." Searcy, 768 F.2d at 913. We consider four factors in deciding whether the denial of a continuance based on the unavailability of witnesses was an abuse of discretion:

> (1) whether due diligence has been exercised to obtain the attendance of the witness[ ]; (2) whether substantial favorable evidence would be tendered by the witness; (3) whether the witness is available and willing to testify; (4) whether the denial of the continuance would materially prejudice the defendant.

Id.[12] In addition, we bear in mind that a "trial court is inevitably in a better position" than a reviewing court "to

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[12] We note that the petitioner measures the denial of the continuance against the standard governing severances; however, we think that motions for continuances of a trial until after a codefendant's trial provide the more fitting analogy to the instant case, see Poston, 902 F.2d at 97. In any event, the factors considered by the severance standard resemble those governing the continuance standard, see United States v. Lopez, 6 F.3d 1281, 1285 (7th Cir. 1993), and applying severance principles here would not change our decision.

evaluate the need and justification of additional time, as well as the burden the rescheduling may have on the court's docket." United States v. Stevenson, 6 F.3d 1262, 1265 (7th Cir. 1993).

After considering these factors, we conclude that the trial court's refusal to continue the petitioner's trial until after the completion of Terrell's trial did not render Hennon's trial fundamentally unfair. It is true that Hennon diligently sought to call Terrell as a witness. However, it remains unclear whether Terrell would have provided substantial favorable testimony. Just prior to the trial court's decision on the scheduling motion, Terrell's attorney declared, "I will . . . say that Mr. Terrell did not have a part to play in the killing of the boy." Supp. Tr. 11. In addition, Terrell's attorney later argued "strenuously" to the trial court against the introduction of Terrell's statement at Hennon's trial—Terrell had moved to suppress the statement at his own trial. Tr. III, 103. Faced with these protestations against Terrell's statement to the police, the trial court could justifiably believe that Terrell's testimony would actually inculpate Hennon as the driver.[13]

As to the third factor, Hennon failed to show the trial court that Terrell would be willing to testify if tried first.[14] Regardless of the outcome of Terrell's trial, it

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[13] Moreover, even if Terrell testified consistently with the statement to the police, the testimony would actually impugn, in part, Hennon's credibility: the statement reported that Mack, not Jobe, was the gunman.

[14] In light of our disposition of the issue, we need not decide whether a defendant may even obtain a severance when the

(continued...)

would be unlikely that Terrell would incriminate himself as the Nova's driver. The State's witnesses presumably constrained the State to prosecute Terrell as the Nova's back seat passenger. Because drivers in drive-by shootings are generally subject to harsher sentences than passengers, it would still be against Terrell's self-interest to later admit, at Hennon's trial, to driving the Nova: Terrell could jeopardize his appeal if convicted, face a harsher sentence, risk prosecution as the driver, or open himself to a perjury charge. Even if Terrell pleaded guilty as the passenger—which he did—the State could move to vacate the guilty plea if Terrell proved, by later admitting that he drove the Nova, that he lied about his role. In light of these doubts regarding Terrell's willingness to testify, and without any other support to show that Terrell would testify if tried first, cf. McNeal, 853 F. Supp. at 1050 (continuance of defendant's case granted until after codefendant's trial where codefendant averred in affidavit that he would testify after his trial and even if he appealed), we conclude that Hennon failed to demonstrate Terrell's willingness to testify.

Finally, we conclude that refusing to continue Hennon's trial until after Terrell's trial did not materially prejudice the defendant. Over the State's objection, the trial court permitted Hennon to publish Terrell's statement to the jury. Tr. IV, 217-221. Thus, the jury did

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[14] (...continued)
request is based on a codefendant's willingness to testify if tried first. United States v. McNeal, 853 F. Supp. 1047, 1050 (N.D. Ill. 1994) (collecting cases and declaring that a majority of circuits hold that a "conditional promise to testify is insufficient because defendants have no right to control the order in which a case will be tried").

consider Terrell's admission that he drove the Nova. In addition, as the State explained in its objection to the statement, the prosecution was unable to cross-examine Terrell. In sum, the continuance did not cause material prejudice because the publication of Terrell's statement adequately helped to convey Hennon's defense theory to the jury. Accordingly, we conclude that the trial court did not violate Hennon's right to due process by refusing to grant the continuance.

IV. Conclusion

For the reasons set forth above, we deny the petition for a writ of habeas corpus. It is so ordered.

App. 35

[Dated March 16, 1992]

No. 1-89-3339

APPELLATE COURT OF ILLINOIS
FIRST DISTRICT, FIRST DIVISION

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	Appeal from the Circuit Court of Cook County
Plaintiff-Appellee,	)	
v.	)	
	)	Honorable Willliam Cousins Presiding
ADRIAN HENNON,	)	
Defendant-Appellant.	)	

JUSTICE O'CONNOR delivered the opinion of the court:

Following a jury trial, defendant Adrian Hennon was convicted, based on accountability, for first degree murder, attempted murder, and armed violence (Ill. Rev. Stat. 1987, ch. 38, pars. 9-1, 8-4, 33A-2, 5-1), in the shooting of two individuals. The trial judge sentenced defendant to concurrent prison terms of 40 years for murder and 20 years each for attempted murder and armed violence.

We affirm.

Defendant's convictions arose from events of September 9, 1988, when gunshots, fired from a passing automobile, killed Abdullah Asad and wounded Jason Murray who were then standing in a park at 87th and Jeffery Streets, near Chicago Vocational High School, in Chicago. Defendant was identified as the owner and driver of the automobile, a Chevrolet Nova.

Other facts related to the contentions raised by defendant on appeal are summarized in the context of the consideration of those matters below.

I

Defendant contends that he was not proved guilty beyond a reasonable doubt because the evidence did not establish that he was the driver of the Nova or show that he possessed the requisite intent to support his convictions on the basis of accountability (see Ill. Rev. Stat. 1987, ch. 38, par. 5-2(c)). Defendant points to his own testimony that he was merely a passenger in the front seat of the Nova and was unaware of the existence of a gun in the car or the shooter's intent. He also relies on the admission of a statement given to police by Richard Terrell in which Terrell stated that he, not defendant, had been the driver of the Nova.

At trial, four witnesses identified defendant as the driver of the Nova at the time the gunshots were fired.

Elward Verrett testified that, minutes before the shooting, he saw Jason Murray exchange words with occupants of a passing jeep. Apparently, the jeep had nearly struck Murray as he walked to the park where Verrett and others were present. The jeep's occupants threatened to return. When the jeep did shortly return, it was followed by the Nova. The vehicles stopped and the occupants, six or seven individuals, displayed a particular street gang hand signal as they approached Verrett and the others. Defendant and Terrence Mack were among the group. An argument ensued and, at some point, Verrett heard Mack say, "Shoot him. Shoot him." Never-

theless, defendant, Mack, and the individuals with them returned to their vehicles and left.

The Nova returned shortly thereafter with defendant driving and Mack in the front passenger seat. As the Nova approached, Verrett stated, it slowed to 10 to 15 miles per hour. Mack reached out of the Nova's window with a pistol in his hand and started shooting. Eight shots were fired.

Esau Asad, the older brother of Abdullah Asad, corroborated Verrett's testimony. Darren Harris also saw defendant driving the Nova while Mack fired gunshots from the front passenger seat.

Although Devon Miller also testified to the same facts at trial, he admitted he had initially told defense investigators that the gunshots had been fired from the Nova's back seat and that he could not remember whether defendant was the driver.

Robert King, who testified on defendant's behalf, also heard the gunshots but did not see where they were being fired from. King did state he saw the Nova immediately after the shots were fired and saw that defendant was the driver.

It was defendant's testimony that Richard Terrell had driven the Nova at the time of the shooting. Defendant stated he and Terrell had met earlier that day and that Terrell had asked defendant for a ride to a motel to meet Terrence Mack. Terrell asked, and defendant agreed, to let Terrell drive to the motel. Mack eventually joined them. Later, while on the way to a gas station, and with Terrell still driving, they encountered Mark Watts, Terrence Jobe, and Haroon Binwalee in the jeep. They asked defendant, Mack, and Terrell to follow them to

Chicago Vocational High School. There, Watts, Jobe, Binwalee, and Mack exited the vehicles. Terrell and defendant, who was in the front passenger seat, stayed in the Nova. When the four individuals returned, Mack got into the jeep, and Jobe got into the back seat of the Nova.

After getting gas, Jobe asked to be driven to get something to eat. Defendant stated that as Terrell drove east past a crowd, Jobe started shooting. Defendant was unaware Jobe had a gun. Shortly hereafter, they saw the jeep again. Jobe got out of the Nova and got into the jeep.

Defendant stated he then told Terrell that he wanted to drive. Mack joined them. After being seen by the police, however, Terrell and Mack got out of the car.

Soon after, defendant was arrested.

Defendant's testimony that he was not driving the Nova at the time the shots were fired was corroborated by the testimony of Mark Watts and the statement Terrell had made to police, which was read to the jury.

Defendant argues that the identification of him as the driver when the gunshots were fired was flawed because only a limited opportunity existed to view the Nova as it passed the park. Defendant also points out that, although he had been identified out of a police lineup, none of those who then identified him specifically stated he had been the driver. Defendant also draws attention to Watt's testimony and Terrell's admission establishing that Terrell, not defendant, drove the Nova at that time.

Defendant's arguments rest, ultimately, on the credibility accorded the various witnesses' testimony, the weight to assign that testimony, and the inferences to be drawn

by the jury as the trier of fact. We may not properly consider those determinations here. (See People v. Brisbon (1985), 106 Ill.2d 342, 478 N.E.2d 402, cert. denied (1985), 474 U.S. 908, 88 L.Ed.2d 241, 106 S.Ct 276; People v. Bradford (1985), 106 Ill.2d 492, 478 N.E.2d 1341.) The standard we must apply is whether, viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (People v. Collins (1985), 106 Ill.2d 237, 478 N.E.2d 267.) In that regard, an individual is legally accountable for the conduct of another when he solicits, aids, abets or agrees or attempts to aid another in the planning or commission of an offense with the intent to promote or to facilitate its commission. Ill. Rev. Stat. 1987, ch. 38, par. 5-1; People v. Taylor (1991), 219 Ill.App.3d 47, 579 N.E.2d 383. Here, testimony established that defendant was with the group of individuals who displayed gang hand signs during the altercation in the park after Murray exchanged words with the occupants of the jeep. At that time, Verrett heard Mack direct someone to shoot. Witnesses identified defendant as the driver of the Nova when the Nova subsequently returned before the shooting incident. Specifically regarding defendant's facilitation of the shooting, there was testimony that defendant actually slowed the Nova as it passed immediately before the gunshots were fired. That testimony, viewed in a light most favorable to the State, sufficiently establishes the elements of accountability to sustain defendant's convictions. See People v. Rodriguez (1980), 89 Ill.App.3d 941, 412 N.E.2d 655.

II

Defendant complains the State deprived him of a fair trial by making numerous improper remarks during closing and rebuttal arguments to the jury. Defendant contends the State misstated the law of accountability, indicating a lesser requisite burden of proof. Defendant points to references to accountability as a crime recognizing "teamwork" and "power[ ] in numbers." Defendant refers to the State's attempt to illustrate the offense of accountability within the context of an armed robbery undertaken by two individuals where one "never gets out of the car." Defendant also complains the State improperly implied that the use of defendant's car, alone, would be sufficient to find defendant guilty.

The above contentions do not provide cause to disturb defendant's conviction. Even accepting that the statements concerning accountability might constitute misstatements of the law, defendant's arguments are of little consequence here because the trial judge admonished the jury that he would instruct them on the law and properly did so. (People v. Lawler (1991), 142 Ill.2d 548, 568 N.E.2d 895.) Further, because the gunshots were fired from defendant's car, the statement concerning the use of defendant's car as being instrumental in Asad's death was essentially correct. See People v. Willis (1983), 119 Ill.App.3d 34, 456 N.E.2d 165.

Defendant also argues the State improperly remarked that "passengers in these drive-by murders get convicted all the time."

Regarding this particular comment, we note that defendant's counsel's objection was sustained. Immediately thereafter, the State clarified the statement to indicate

merely that a passenger could be found to be as accountable as the driver. Given that the above comment was made during rebuttal argument and the prompt rephrasing of the comment, we cannot conclude defendant was prejudiced. See People v. Bryant (1983), 94 Ill.2d 514, 447 N.E.2d 301.

We find no merit in addressing other comments complained of by defendant as improperly inflaming juror passions or implying a fabricated defense because, after reviewing each of those comments in light of the evidence presented, the comments simply provide no reason to disturb defendant's convictions. See Bryant, 94 Ill.2d 514, 447 N.E.2d 301.

III

Defendant next argues the State denied him a fair trial because he was persistently questioned on cross-examination regarding matters to which objections had been sustained. Defendant complains the State sought to establish in the jury's mind that defendant's counsel was obstructing the judicial process. Specifically, the examination involved defendant's knowledge of gang activity, his relationship with Mack, talk inside the Nova, and questions implying defendant attempted to flee the police.

Although the State may not properly repeat questions to which objections have been sustained in order to portray the defense effort as an attempt to keep damaging evidence from the jury's consideration (see, e.g., People v. Weinger (1981), 101 Ill.App.3d 857, 428 N.E.2d 924), we cannot say the State's questioning here rose to that level or otherwise prejudiced defendant. In each case, the

line of questioning had some basis in the evidence. For example, the evidence indicated the incident had some basis in gang activity. Gang hand signs were exhibited during the initial altercation in the park before the shooting.

IV

Defendant complains that the trial judge refused to instruct the jury on the offense of involuntary manslaughter, arguing that the evidence at trial showed that the shooter acted without the requisite intent or knowledge to support a murder conviction. Other than Terrell's statement, defendant argues, the State presented no evidence as to conversations inside the Nova to support the requisite intent to commit murder. Further, defendant asserts, Terrell's statement established only that Mack told Terrell to head the car toward the park because Mack "wanted to straighten [the individuals in the park] out" and that he wanted "to pop over at them and scare them." Those facts, defendant argues, indicates Mack possessed only a reckless state of mind and, because he was charged with accountability, defendant contends he was entitled to the instruction.

Generally, an involuntary manslaughter instruction is not warranted where a defendant voluntarily and willfully commits an act which has a natural tendency to cause death or great bodily harm. (People v. Whitt (1986), 140 Ill.App.3d 42, 487 N.E.2d 1246; People v. Cannon (1979), 49 Ill.2d 162, 273 N.E.2d 829.) Here, evidence established that Mack intentionally shot in the direction of the victims while sitting in the passenger seat of defendant's automobile as defendant slowed

travel. In view of that evidence, it was not improper for the trial judge to refuse to instruct the jury regarding involuntary manslaughter. See Cannon (1971), 49 Ill.2d 162, 273 N.E.2d 829.

V

During deliberations, the jury submitted a note to the trial judge asking whether the defendant was required to know what crime was to be committed in order to be held legally accountable. The trial judge responded by directing the jury that it "should read and discuss the instructions in order to resolve the inquiry."

Defendant now complains that the trial judge erred by not specifically, and affirmatively, answering the jury's inquiry.

A trial judge may properly exercise his discretion and decline to answer the jury's inquiry where the given jury instructions are readily understandable and sufficiently explain the relevant law. People v. Wade (1988), 167 Ill. App.3d 921, 522 N.E.2d 285.

The trial judge instructed the jury in the following manner regarding accountability:

> "A person is legally responsible for the conduct of another person when, either before or during the commission of an offense, and with the intent to promote or facilitate the commission of that offense, he knowingly solicits, aids, abets, agrees to aid, or attempts to aid the other person in the planning or commission of the offense."

That instruction contained a clear explanation of the law of accountability. More importantly, the trial judge's par-

ticular response to the jury's inquiry was informative because it indicated the answer to that specific question could be found in the instruction itself. The instruction directs that defendant's accountability depended upon the shooter's conduct if, before or during the shooting, defendant had the intent to promote or facilitate the commission of that offense. The trial judge simply had no reason to further explain the instructions.

VI

Prior to trial, defendant successfully moved to sever his trial from that of co-defendant Terrell. However, the trial judge denied defendant's request, pursuant to the same motion, to conduct defendant's trial prior to Terrell's trial. Defendant had intended to have Terrell testify in person that he, not defendant, was the driver of the Nova, consistent with the statement Terrell had made to police. The trial judge ordered that the trials proceed in the order in which the defendants were named in the indictment. At defendant's trial, Terrell declined to testify, asserting his fifth amendment right against self-incrimination.

Defendant now complains he was prejudiced because his trial was held before Terrell's. Further, defendant contends the trial judge improperly refused to explain Terrell's unavailability and invocation of the fifth amendment right to the jury by way of an instruction.

Any argument that defendant was prejudiced because his trial preceded that of Terrell is, at best, speculative. There is no basis in the record to suggest that Terrell would have testified in defendant's trial if it had been held first. Even so, whether his testimony would have

been consistent with the statement he gave to police is a matter of speculation. It is conceivable that, given Terrell's conviction in that trial, he might have elected to decline to testify in defendant's trial, preserving his fifth amendment right in the likelihood of winning retrial in a subsequent appeal. In any case, we note that, notwithstanding the speculative nature of defendant's argument, Terrell's statement was published, and considered, by the jury. Thus, we cannot conclude the trial judge's decision to order the trials as he did prejudiced defendant.

Further, although an instruction such as defendant sought to have the trial judge give is proper (People v. Cvetich (1979), 73 Ill.App.3d 880, 391 N.E.2d 110), it is not mandatory. Most importantly, the absence of an instruction here did not deprive defendant of any constitutional right. Terrell's statement spoke for itself. In fact, by refusing to give an explanation for Terrell's failure to testify, there was no risk that the jury's decision could have been based upon speculation as to what Terrell's testimony would have been had he not invoked his fifth amendment right.

VII

Prior to trial, defendant moved to suppress evidence relating to the identification of him from a lineup conducted the day of his arrest. During a hearing on the motion, the trial judge sustained numerous objections to questions asked by defendant's counsel, pertaining, generally, to the procedure used by police prior to and during the lineup as well as police contact with those who were to view the lineup.

Defendant contends the trial judge unduly restricted the scope of his counsel's examination during hearing on defendant's motion to suppress identification, thereby precluding defendant from establishing circumstances indicating suggestiveness.

We do not agree. Defendant's counsel was permitted to make the necessary inquiries of the individuals who observed the lineup. Specifically, the trial judge permitted counsel to ask Devon Miller whether he saw the individuals he later identified in the lineup while he was in the 4th District police station prior to observing the lineup at the Area 2 police station. The trial judge also permitted counsel to ask if Miller had spoken to police officers before the lineup, had observed any photographs, or had been told anything by police concerning who would be in the lineup. Miller answered all of those questions in the negative. Counsel was permitted to ask Elward Verrett, Jr., Anthony Gibson, and Esa Asad the same questions. Each also answered those questions in the negative.

Counsel was further permitted to ask Chicago Police detective William Higgins whether, while at the police station, those viewing the lineup had seen the individuals who were later identified. He was permitted to ask Chicago Police detective James P. Butler what he, Butler, told the witnesses who later viewed the lineup. The answers given by the detectives did not indicate any suggestiveness in the lineup procedure.

IX

Defendant argues his sentence was improper because he had no prior history of delinquent acts or criminal offenses. Defendant also points to the testimony of wit-

nesses on his behalf who established he had a peaceful nature, and, according to defendant, the lack of evidence showing he was the shooter. Defendant also notes Terrell received only a 22-year prison sentence after pleading guilty to the same offenses.

The record indicates that the trial judge was aware of and considered each of the circumstances now argued by defendant as justification for a decreased sentence. In addition, the 40-year sentence was within the range of punishment prescribed by statute (Ill. Rev. Stat. (1987), ch. 38, par 1005-8-1). Finally, we find no merit in defendant's argument regarding the disparity between his and Terrell's sentences. First, Terrell's sentence followed a guilty plea, not a trial. Even if that fact is ignored, defendant bore a burden to produce a record from which a rational comparison of sentences can be made. (People v. Kline (1982), 92 Ill.2d 490, 442 N.E.2d 154.) Here, the record contains no basis to determine what factors were used in imposing sentence on Terrell such as could provide a basis to examine any perceived disparity in the sentences imposed.

Affirmed.

BUCKLEY, P.J. and MANNING, J., concur.